IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16028 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MESSRS COSMOS TEXTILE MILLS PRIVATE LIMITED

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 16028 of 2003
MR AMAR P DAVE for Petitioner No. 1-2
MR ASIM J PANDYA for Respondent No. 1
DS AFF.NOT FILED (R) for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 04/05/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

What is challenged in this petition under Article 226 of the Constitution is the order dated 21.8.2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai in Appeal No. 3808 of 2001 by which the Tribunal reduced the penalty under Rule 96ZQ(5)(ii) of the erstwhile Central Excise Rules, 1944 ('the Rules' for short) from Rs.6 lakhs to Rs.3 lakhs for the delay of 16 days in paying the duty.

2. An identical controversy which is raised in this petition was also raised in Special Civil Application No.4465 of 2004. After considering the provisions of Rule 96ZQ(5)(ii) of the said Rules, we have laid down following principles in our judgment dated 28.4.2004 in Special Civil Application No.4465 of 2004:

"10. At the relevant time, sub-rule (5) of Rule 96ZQ of the erstwhile Central Excise Rules, 1944 as amended by notification dated 28.2.1999 read as under:-

"(5) If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to,-

(i) pay the outstanding amount of duty along with interest at the rate of thirty-six per cent per annum calculated for the outstanding period on the outstanding amount; and

(ii)_ a penalty equal to an amount of duty outstanding from him or rupees five thousand, whichever is greater."

"11. Having heard the learned counsel for the parties, we are of the view that since Rule 96ZQ(5)(i) provided for levy of interest on delayed payment and sub-rule (ii) provided for penalty for such delay, in the context of Rule 96ZQ(5) the quantum of penalty cannot be disproportionate to the length of the delay in payment of duty. Looking to the fact that the rule making authority itself has provided for maximum penalty equal to an amount of duty outstanding from the assessee or Rs.5,000/whichever is greater, the amount of penalty would be 100% if the delay in payment is

by one year or even by two years. Looking to the object of penalty under Rule 96ZQ(5), the authorities would be guilty of total non-application of mind, if the period of delay is overlooked or if past history of regularity or otherwise in payment of duty is not considered while determining the quantum of penalty. Penalty for delay of nine days can not be the same as penalty for the delay of one year in paying the excise duty. Since the rate of interest stipulated in sub-rule (i) is 36% per annum calculated for the outstanding period on the outstanding amount, the hundred percent penalty will be three times the amount of interest (36% x 3 = 108%). This means, the penalty should not be at a rate higher than 100% per annum calculated for the outstanding period on the outstanding amount. It, therefore, appears to us that the formula of penalty not exceeding three times the amount of interest levied would not only be commensurate with the extent of delay in payment of the outstanding amount, but would also achieve the object underlying Rule 96ZQ(5).

It is clarified that these observations are limited to the question of penalty to be levied under clause (ii) of sub-rule (5) of Rule 96ZQ because the penalty is only for the delay in payment of duty. This principle would obviously not apply under other Rules where the penalty is to be imposed for playing fraud or for suppression of facts or for clandestine removal of goods."

3. From the details given in the impugned order of the Tribunal, it is clear that the delay in payment of the duty amount was only 16 days. Since neither the original authority nor the appellate authority has considered the extent of delay in payment, we set aside the Order in Original and the order of the appellate authority i.e., Annexures C and E respectively in so far as they impose penalty on the petitioners under the provisions of Rule 96ZQ(5)(ii). The matter is to be remanded to Deputy Commissioner of Central Excise and Customs, Ankleshwar, District Bharuch for determination of penalty under the provisions of Rule 96ZQ(5)(ii) of the Rules in light of the principles laid down in the aforesaid judgment.

Rule is made absolute to the aforesaid extent

with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

(karan)